(3)

No. 98-1509

IN THE

Supreme Court of the United States

COLUMBIA UNION COLLEGE,

Petitioner,

v.

EDWARD O. CLARK, JR., *et al.*

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICI CURIAE COUNCIL ON RELIGIOUS FREEDOM, NORTHWEST RELIGIOUS LIBERTY ASSOCIATION, SEVENTH-DAY ADVENTIST CHURCH STATE COUNCIL, THE INTERFAITH RELIGIOUS LIBERTY FOUNDATION, AND WALTER PONTYNEN IN SUPPORT OF RESPONDENTS

NICHOLAS P. MILLER
COUNCIL ON RELIGIOUS FREEDOM
110 N. Washington Street
Rockville, MD 20850
(301) 294-8766

LEE BOOTHBY
Counsel of Record
BOOTHBY & YINGST
4545 42nd Street, NW
Suite 201
Washington, DC 20016
(202) 363-1773

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

2788

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF INTEREST OF AMICI CURIAE*

Pursuant to Rule 37.2, the letters from the parties consenting to the filing of this brief are being filed simultaneously with this brief. The Council on Religious Freedom, the Northwest Religious Liberty Association, The Seventh-day Adventist Church State Council, The Interfaith Religious Liberty Foundation and Walter Pontynen have been or are associated with religious schools and colleges. Amici desire to protect the legal rights of these schools to vigorously pursue their religious missions. Interests of each amici are further set out in the appendix attached hereto.

SUMMARY OF ARGUMENT

In its rush to gain state aid, petitioner advances arguments that would undermine the constitutionally protected status of religion. Never has the Court indicated that the factual inquiry involved in deciding if a college is pervasively sectarian involves excessive entanglement between church and state. Further, Columbia Union is in no position to raise such a claim, as in the courts below petitioners argued that the college is not pervasively sectarian, thereby minimizing any potential entanglement concerns.

Under the Constitution, religion is not equal to other institutions or ideologies, but rather it has a special status that brings with it privileges and corresponding responsibilities. Petitioner seeks to rid itself of certain responsibilities, namely that of receiving only private funding and support, by arguing that Columbia Union should

---

* No other person other than counsel for amici curiae has contributed to the authoring of this brief, in whole or in part, and no person or entity other than amici curiae has made a monetary contribution to the preparation or submission of this brief.

be treated "equally" with other largely secular colleges. Yet those same arguments would undermine the protections Columbia Union receives in the areas of hiring, firing and regulation of student life that allows College leadership to advance its religious mission. Amici, some of who represent the interests of other Seventh-day Adventist educational institutions, are concerned that petitioner's arguments, if accepted, would threaten the ability of other religious colleges to wholeheartedly pursue their missions.

But if the "pervasively sectarian" category is to be discarded on the rubbish heap of outmoded constitutional metaphors, which amici believe would be disastrous, such an act should not be contemplated when it has not been legally established that such an institution is even before this Court. The petition should be rejected and the fourth circuit's remand for further fact-finding should be affirmed.

REASONS THE WRIT SHOULD BE DENIED

I. THE CONSTITUTION BOTH ALLOWS AND REQUIRES CAREFUL FACT-FINDING TO DECIDE IF A COLLEGE IS PERVASIVELY SECTARIAN.

The special legal status given to religious entities must be protected from misuse by non-religious groups that fraudulently seek protection against regulations from which religious institutions are exempted. Likewise, pervasively religious colleges should not be allowed to downplay their true religious character in order to gain public funds. Thus, courts must engage in careful and thorough fact-finding to decide if a college is pervasively sectarian. Entanglement concerns raised by such an inquiry are greatly diminished when a college denies that it is pervasively sectarian, as Columbia Union has done in the courts below.

While the state will treat a "pervasively sectarian" school differently from its secular counterparts, including those that are religiously affiliated, such treatment is not discrimination among religions. Rather, it is merely the different approaches the constitution mandates that the state takes towards religion and non-religion. Any pressure to disavow religious beliefs and practices that such differing treatment may place on religious entities is more than balanced by the favorable protections and privileges religious groups receive under our laws and constitution.

A. Courts Must Look Beyond Course Handbooks And Policy Statements In Deciding If A College Is Pervasively Religious And Entanglement Concerns Raised By The Inquiry Are Minimized When A College Denies That It Holds That Status.

This Court's decisions indicate that a careful and thorough factual examination of a college's policies *and* practices is necessary to decide whether it is pervasively sectarian, and nowhere has the Court suggested that such an inquiry violates the constitution. *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971). The *Roemer* decision is an example of the extensive fact-finding that the Court has considered appropriate in deciding if a college is pervasively sectarian. In *Roemer*, which involved the very grant program at issue here, this Court listed findings taken from "several weeks of trial" (*Roemer*, 426 U.S. at 758) upon which the "pervasively sectarian" inquiry was based. These included the following factual findings about the colleges at issue:

(1) Despite their formal affiliation with the Catholic Church, the colleges are characterized by a high degree of institutional autonomy. *Id.* at 755;

(2) None of the colleges receives funds from or makes reports to the affiliated church. *Id.*;
(3) The church is represented on their board, but it was not shown that in any instance any church considerations entered into college decisions. *Id.*;
(4) Worship attendance is not required. *Id.*;
(5) Encouragement of spiritual development is only a secondary objective at those institutions. *Id.*;
(6) At none of the institutions does this encouragement go beyond providing the opportunities for religious experience. *Id.*;
(7) Religious indoctrination is not a substantial purpose or activity of the institutions. *Id.*;
(8) Although religion and theology courses are taught at each of the colleges, such courses only supplement a curriculum covering the spectrum of a liberal arts program. *Id.*;
(9) Non-theological courses are taught in an atmosphere of intellectual freedom and without religious pressure. *Id.*;
(10) Each of the colleges subscribes to and abides by the 1940 Statement of Principles of Academic Freedom of The American Association of University Professors. *Id.*

These findings require an inquiry that goes well beyond printed policy statements and bulletin blurbs. Items 5, 6, 7, 9 and 10, relate to the spiritual and academic atmosphere on campus and in the classrooms and would require testimony from some combination of administrators, faculty and students. While an inquiry as to items 1, 3 and 4 could begin with a review of policy statements or governing documents, a careful review would also need testimony from those involved in the governance and administration of the college. These factual inquiries were the results of a several week trial. *Id.* at 758.

But the present case has had no such forum for factual inquiry, either at the administrative stage or during the court proceedings. In the district court proceedings there was no trial or fact-finding hearing. Pet. App. 56a. In the original adjudication of the case by the Maryland Higher Education Commission there was no administrative hearing. Pet. App. 58a. The Commission "did not review any 'statistics' regarding how Columbia Union's policy actually affected student admissions and faculty hiring." Pet. App. 5a. In its administrative decision, the Commission noted that all information it received about Columbia Union came from written material submitted by the college. Pet. App. 105a. The Commission stated that it had not audited courses, spoken with students or faculty members or conducted "any other type of on-campus subjective assessments" regarding the religiosity of Columbia Union. Pet. App. 105a.

Prior to *Roemer*, this Court recognized the need of looking beyond mere policy statements in the pervasively sectarian inquiry. *Tilton v. Richardson*, 403 U.S. 672, 681 (1971). In *Tilton*, at issue was the constitutionality of a federal law that provided construction grants for private colleges and universities. The grants went to certain church-related institutions, but were to be used exclusively for secular educational purposes. *Id.* at 674-75. The Court acknowledged that it would be unconstitutional for such aid to go to pervasively sectarian colleges or universities. The Court referred to a "composite profile" of a pervasively sectarian college whose characteristics would disqualify it for state aid. The profile involved the following elements, all of which require a careful factual inquiry:

(1) The college imposes religious restrictions on admissions;
(2) requires attendance at religious activities;

(3) compels obedience to the doctrines and dogma of the faith;
(4) requires instruction in theology and doctrine; and
(5) attempts to propagate a particular religion. *Id.* at 682.

In *Tilton*, certain of t e religiously affiliated colleges had institutional documents that placed religious limits on academic freedom. *Id.* at 681. But the Court chose to move beyond the policy statements, and noted that "other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination." *Id.* The parties in *Tilton* had stipulated that the courses at the colleges were taught according to the "academic requirements of the subject matter and to the teacher's concept of professional standards." *Id.*

Unlike *Tilton*, the issue of academic freedom and the religious content of "secular" academic courses is one of the main points of contention in the present case. Based on a reading of the academic bulletin, the district court below concluded that religion dominates Columbia Union's academic courses. Pet. App. 65a-66a. The court of appeals held that the evidence on this point was open to opposite inferences, and that further fact finding was necessary to uncover the truth. Pet. App. 28a-29a.

Similarly, in *Hunt v. McNair*, 413 U.S. 734 (1973), the record established that the colleges at issue had "no religious qualifications for faculty membership or student admission." *Id.* at 743-44. The present case is markedly different, as Columbia Union ostensibly uses religious criteria in faculty hiring and firing and in student admissions. Further, the Commission specifically noted that it had not reviewed any statistics regarding how Columbia Unions policies affected student admissions and faculty hiring. Pet. App. 125a, 126a.

Nowhere in the *Hunt, Tilton, Roemer* trilogy did the Court hold that a careful examination of the religious elements of the subject colleges raise excessive entanglement concerns. This was no doubt due in part to the fact that the colleges at issue in those cases did not claim to be pervasively sectarian, and thus *Lemon* "excessive entanglement" concerns were minimized. As this Court has stated, the "degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institutions. In finding excessive entanglement, the Court in *Lemon* relied on the 'substantial religious character of these church-related' elementary schools." *Hunt*, 413 U.S. at 746, citing, *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). The obverse of this is where, as in *Hunt, Tilton*, and *Roemer*, the schools are only religiously affiliated and not pervasively sectarian. In these cases, the Court viewed the entanglement questions as diminished and held that the state inspections at issue would not cause a constitutional concern. *Tilton*, 403 U.S. at 685-88; *Hunt* 413 U.S. at 746-47; *Roemer*, 426 U.S. at 764-65.

In seeking the Sellinger funds, petitioner argued that Columbia Union does not fall under the pervasively sectarian definition. It insisted that under *Roemer, Hunt* and *Tilton*, "Columbia Union's institutional structure plainly does not support the conclusion that the College is pervasively sectarian." (Brf. of Appell. in the U. S. Ct. of App. for the Frth. Circ. p. 25.) A large part of petitioner's appeals brief below was spent in developing this argument. (*Id.* at 23-35; listing the similarities between Columbia Union and those colleges found not to be pervasively sectarian in *Roemer*.)

Petitioner cannot have it both ways. It cannot fairly argue that Columbia Union is not pervasively sectarian, and then argue that Columbia Union cannot be reviewed for religious content because of entanglement concerns. This is not

arguing alternatively, it is arguing contradictorily. Once Columbia Union makes the claim that it is *not* pervasively sectarian, it essentially loses its ability to complain of excessive entanglement arising from the subsequent state inquiry for two reasons. First, Columbia Union's very denial is an invitation to state scrutiny of its religious nature to determine if indeed this denial is true. Secondly, by its denial Columbia Union abandons, at least for purposes of seeking Sellinger funds, the claim that its religious mission is pervasive throughout its programs, and the entanglement concerns arising out of a state inspection are greatly diminished, as noted in *Hunt* and *Lemon*.

Because of its earlier denial of Columbia Union's pervasively sectarian status, the cases petitioner cite to support its claim that the lower courts proposed factual inquiries will produce "excessive entanglement" are inapplicable. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *New York v. Cathedral Academy*, 434 U.S. 125 (1977). These cases involved parochial secondary schools, presumed to be pervasively sectarian, and thus dealt with a heightened entanglement standard, unlike the present case. Columbia Union, as a college, is presumed *not* to be pervasively sectarian, and in light of its denials below in this regard, cannot fairly argue that it should have the advantage of the excessive entanglement concerns found in these cases.

In fact, *Cathedral Academy* undercuts petitioner's larger argument that Columbia Union should receive state funds. The case is not about identifying pervasively sectarian entities, but rather about the constitutional problems of giving funds to such entities. *Cathedral Academy* holds that state money paid to fund secular parts of pervasively sectarian schools will inevitably result in excessive entanglement of church and state, because under the

constitution the use of those funds must be carefully monitored or audited by the state. *Id.* at 132-33.

Ironically, this evil is precisely what petitioner invites. It rejects the notion of an initial government determination of Columbia Union's pervasively sectarian status, but essentially invites the government to participate in an ongoing, never-ending audit of the college's programs to ensure that state funds are not used for sectarian purposes. (See Pet's. Pet. for Writ of Cert., pp. 23, 27). Petitioner's proffered cure for entanglement is a worse malady than the ill sought to be remedied. The proposed solution would lead to a more prolonged, and thus more intrusive, fact-finding than the one which petitioner argues against here.

B. The Funding Duties Borne By Religious Entities Are More Than Balanced By The Privileges And Protections Given Religious Schools.

Any pressure felt by Columbia Union to compromise its religious mission to gain state funding is more than offset by the legal privileges and protections a religious college enjoys in pursuing its religious mission. In applying the First Amendment guarantees of religious freedom, or in construing federal statutes in light of these freedoms, federal courts have conferred on religious entities rights and privileges not enjoyed by similarly situated secular groups.

Under the constitution, pervasively sectarian organizations have the right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Religious organizations have absolute discretion in regards to the employment of ministers, rabbis, priests and teachers of theology or religion, and are shielded from nearly

all claims brought under state and federal employment statutes by these employees. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972).

The pervasively sectarian standard has also been used in creating or construing statutes to give religious entities exemptions from generally applicable regulatory requirements. Pervasively sectarian schools are exempted from the jurisdiction of the National Labor Relations Board and can prevent their staff from unionizing. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979). Under 42 U.S.C. § 2000e-2(e)(2), religious entities have the right to hire and fire their employees, from presidents to janitors, on the basis of religious beliefs or criteria. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). If petitioner's arguments are accepted about the over-intrusiveness of the "pervasively sectarian" inquiry, than these exemptions must also be unconstitutional, as they require the very same inquiry. *EEOC v. Kamehameha*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993); *EEOC v. Miss. College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Secular private colleges, even those that are religiously affiliated, are not allowed to hire and fire on the basis of religion. While religiously affiliated colleges may be able to use religious criteria in the hiring of chaplains and religion teachers, the burden is on the college to prove that these positions are religiously related. *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992) (Ministerial status of nun employees did not allow university exemption from employment regulations where job positions were purely secular.) These types of private colleges cannot regulate student admissions and student behavior based on religious

moral standards. *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 117 (D.C. Cir. 1987) (University must provide benefits to student gay club even if club ideals contrary to religious goals of school.) Neither are these colleges exempt from union organizing.

Irrespective of whether or not Columbia Union has been legally found to be pervasively sectarian, the record below demonstrates that the college is the beneficiary of the protections and privileges accorded highly religious institutions. The district court below found that Columbia Union College (CUC) had the following characteristics:

1. CUC's bylaws require at least 34 out of the 38 voting members of its board of trustees be members of the Seventh-day Adventist ("SDA") Church. Pet. App. 62a;
2. CUC requires its students to attend religious services. Pet. App. 63a;
3. Students who live in the college's residence halls must attend three out of six weekly worship options in the residence halls. Pet. App. 63a;
4. CUC requires students to take religion courses, courses which the district court found to be aimed at inculcating the SDA faith rather than teaching theology as an academic discipline. Pet. App. 64a;
5. CUC's Policy Handbook for Administration and Faculty directs faculty to "bear in mind their peculiar obligation as Christian scholars and members of an SDA college." Pet. App. 65a;
6. The faculty "have complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college -- an SDA institution of higher education." *Id.*

7. CUC does not subscribe to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors. *Id.* at n.11;
8. The description of several of CUC's nominally secular academic departments are replete with references to religion. Pet. App. 66a;
9. Unlike the colleges in *Roemer* and *Hunt*, faculty hiring and student admissions decisions are not made without regard to religion. CUC's Human Rights Policy reserves the right "to give preference in employment of faculty and staff and admission of students to members of the [Seventh-day Adventist Church]." Pet. App. 66a;
10. CUC's admission application asks applicants to state their religious affiliation. Pet. App. 66a; and
11. CUC's Bulletin states it "welcomes applications from all students whose principles and interests are in harmony with the policies and principles" of the Seventh-day Adventist Church. Pet. App. 66a-67a.

Most of these elements could not legally be found in a state funded secular private college, even in those with a religious affiliation. These elements give Columbia Union a tremendous advantage in pursuing its unique religious mission. Such an advantage, properly understood and appreciated, more than offsets the "pressure" brought to bear on a wholly religious college by the enticement of state funding. The desired "intrusion" of state funding is put into context by the less desirable "intrusion" of state regulation and oversight that inevitably and constitutionally must accompany such funding. It may indeed be unlawful, as petitioner argues, to condition receipt of a government benefit on the surrender of a constitutional right. But a college's act of accepting state money is itself the surrender of the constitutional right to be free from state intrusion, as funding is a form of state intrusion. Petitioner cannot

coherently complain that Columbia Union's religious right to be free from state intrusion is violated by the state's refusal to intrude, just because the particular intrusion at issue, state funding, is considered desirable by petitioner.

II. THE CONSTITUTION STILL RECOGNIZES PERVASIVELY SECTARIAN INSTITUTIONS AND STILL PROHIBITS DIRECT STATE AID TO SUCH ENTITIES.

The constitution can only protect that which the Court can define. If this Court cannot distinguish between religious and non-religious organizations, it will have no basis for treating religious entities differently from their secular counterparts. The "pervasively sectarian" category is an integral part of this analysis, as it is the measure of when an entity, such as a college or university, is sufficiently religious to be due full legal protections accorded truly religious entities. And this Court's jurisprudence still holds that the state cannot directly fund or subsidize pervasively sectarian schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (no direct subsidy to religious schools); *Witters v. Wash. Dep't of Serv. For the Blind*, 474 U.S. 481, 487 (1986) (no direct aid, whether cash or in kind, to religious school).

Petitioner's argument that *Witters* abrogated this "no direct funding" rule is profoundly misguided. In *Witters*, the Court found that the state aid ultimately flowing to a wholly religious school was *not* the result of state action. Rather, it was based on the "genuinely independent and private choices of aid recipients." *Id.* at 487. Petitioner's argue here that because the formula to calculate the amount of the Sellinger grant given to a college is based on student attendance at that college, that the *Witters* exception is applicable. (Pet's. Pet. For Writ of Cert., p. 24-25) But if this reasoning is accepted, there will be no practical limit to the amount of money that can flow from state

coffers to religious schools. State legislatures could massively fund pervasively sectarian colleges, as long as that funding was calculated on the number of enrolled students. As a matter of constitutional law, this cannot be right.

What petitioner overlooks is that along with the "state action" distinction, also critical in *Witters* was the "state of mind" issue, in that the state did not have a primary purpose to advance religion. Rather, the state gave money to individual grantees who had a broad range of educational choices, only a portion of which were religious. The state in *Witters* was funding the purposes of a private person, who may or may not have made religious choices, and thus the state could not be accused of having a primary purpose to advance religion. Any advancement of religion was only "incidental" to the purposes of the grant program. In any year, any given religious school may or may not have received state funds, depending on the private, independent choices of individual students.

But under the Sellinger program it would be the choice of the state to send state money directly to all qualified religious colleges every year. The private choices of the students would merely determine the size of the check the state would send to those colleges. It is not that the state check would be sent directly to Columbia Union rather than the student that is important, as petitioner dwells on. (Pet's. Pet. For Cert., p. 24-26.) Rather, the problem would be the state's choice, pre-existing any private choice of a student, to send funds to Columbia Union knowing full well the religious character of the school. This choice runs afoul of the *Lemon* test, which prohibits legislation from having either the purpose or primary effect of advancing religion, and is the kind of "direct subsidy to the religious school from the State" that this Court disapproved in *Witters*, 474 U.S. at 487.

Petitioner's attempt to analogize Sellinger funds to the state payments made to a printer on behalf of a student religious group in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) is likewise inapt. The payments in *Rosenberger* never went to the religious student group, but directly to a secular printer. This assured, without need for monitoring and fears of entanglement, that the money went to its intended use. To compare this with Sellinger funds going to "special revenue accounts" to be used for secular purposes is specious. The religious colleges themselves would be the ones to administer the special revenue accounts, not an independent secular entity as in *Rosenberger*. The fact that accounts would be audited by the state merely raises once again the entanglement issue that so concerns petitioners elsewhere in their brief.

Rosenberger is less of a free exercise/establishment case and more of a free speech case decided according to limited public forum principles. Religious groups must have equal access to forums that the state has created when access is granted to similar but non-religious groups. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Relying on *Lamb's Chapel*, the *Rosenberger* Court held that the school created "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Rosenberger*, 515 U.S. at 830.

Thus, not only does the distinction in *Rosenberger* between the money being paid to the printer versus to the religious group lessen entanglement concerns, but the payment is also not really a subsidy, but a state provision of a "public forum," in this instance a newspaper. *Id.* Columbia Union is not a public forum, and the Sellinger funds would not be used to create such a forum. The funds would be used directly by Columbia Union to further its own, unique educational mission.

Finally, for reasons discussed in the previous section, Columbia Union is ill-suited to raise arguments that the constitutional law of pervasively sectarian institutions should be changed. As the court of appeals below noted, there is an insufficient record to rule Columbia Union as pervasively sectarian. Dramatic changes to the highly sensitive First Amendment category of pervasively sectarian entities should not be contemplated when it has not been established that such an entity is before the Court. On the present record, the Court could not fully explore the implications to a pervasively religious school's methods and mission any such change in the law would entail. The actual classroom practices of faculty, the realities of student life, the role of administrative oversight of academic freedom; the uniqueness of these issues on a pervasively religious campus could not be considered in this case. This is reason enough to affirm the remand of this case for further findings of fact.

III. THE PERVASIVELY SECTARIAN CATEGORY PROTECTS THE ABILITY OF RELIGIOUS SCHOOLS TO CARRY OUT THEIR SPIRITUAL MISSIONS.

Amici include persons presently or previously associated with a wide range of Seventh-day Adventist institutions, including church leaders who currently represent the religious liberty interests of a number of Adventist colleges and universities. Amici are concerned that petitioner's invitation to abandon the pervasively sectarian constitutional category is a call, albeit unintentional, to undermine the special status that religion and religious organizations have in our constitutional scheme. Petitioner's alternative to the present framework is for the state to distribute aid equally and neutrally to religious and non-religious schools and for the government to monitor the use of those funds to assure

that they are used for purely secular purposes. (Pet's. Pet. For Writ of Cert., p. 27).

Amici believe that this "solution" is perfectly calculated to enhance the twin evils of which Columbia Union now complains; discrimination against religious minorities and state intrusion and entanglement in the form of monitoring of religious schools. Once this Court decides that religious entities are eligible for direct state aid, our own history shows that state legislatures will become battlegrounds of warring religious groups seeking their portion of the legislative pie. *Lemon v. Kurtzman*, 403 U.S. 602, 628-29 (1971) (Douglas concurring). Minority religions will inevitably come off as losers, as the majority will have the political muscle to funnel funds to their preferred religions. Talk of "equal" funding in this context is empty, as religions with well developed school systems will benefit at the expense of those religions with relatively small, or non-existent, educational programs.

Further, the monitoring of discrete secular programs in otherwise fully religious colleges will involve the same type of entanglement issues of which petitioners so vehemently complain. And the entanglement concerns will be at their most sensitive, as the funds would go to entities that are pervasively and even wholly religious and sectarian.

Such a scenario alarms amici. Many of them have attended or worked for Seventh-day Adventist educational institutions, and they believe that the ability of these schools to use religious criteria in hiring and firing, to be protected from unionization, to require religiously based lifestyle standards for students and faculty are essential to furthering the spiritual mission of these institutions. These rights would be endangered by the government oversight and regulation that would go with the loss of the pervasively

sectarian category, possibly even without the acceptance of state funds. They are concerned that if state coffers are opened to religious schools, that as a matter of marketplace survival many religious schools will yield to the temptation to accept the proffered funds along with the oversight and regulation that will inevitably follow.

Such concerns are not speculative, but can be seen in the history of those church colleges that have eschewed the pervasively sectarian designation. These colleges stand as examples of what a post-pervasively sectarian world might look like, and it is not a pretty sight. A prominent Catholic scholar, commenting on the Sellenger program at issue here and its relation to Catholic schools, wrote

> Catholic higher education institutions have so watered down the transmission of Catholic doctrine and practice that the distinction between their mission and that of secularly oriented colleges has become blurred enough to permit state aid to the former without violating the First Amendment. The [Court's] decision should hearten those who have hitherto opposed state aid to religious schools, since it indicates that these institutions are losing their proper religious stamp, as so many religious affiliated schools and colleges have in the past, among them the most illustrious American private universities. *On the other hand, the Court's evaluation of Catholic college education should give pause to Catholic educators and challenge them to examine whether they have sold their birthright for a mess of pottage.*

Vincent R. Vasey, *Roemer v. Board of Public Works, Maryland: The Supreme Court's Evaluation of the Religious*

Mission of Catholic Colleges and Church Expectations, 23 Cath. Law. 108 (Spring 1978).

Perhaps petitioner believes that the ill-effects observed by Vasey can be remedied by allowing state funds to go to pervasively religious schools without insisting that these institutions suppress their religious characteristics. But even under petitioner's model, state funds would not go to sectarian portions of the programs of these institutions. (Pet's. Pet. For Cert., p. 14, 23, 27) This would have the same effect as the present system, as it would cause the religious school to define more and more narrowly what were its "religious" programs so that it could use state funds as broadly as possible. Once again, this danger is not speculative. Another Catholic leader has written about the disastrous effects that state aid to secular programs has on the religious components of Catholic colleges:

> Recently I was invited to speak to a group of students majoring in theology at one of the Catholic universities in the mid-west. I was taken to a nondescript, broken-down building which was . . . totally separated from the rest of the campus. That is where religion is because all of the other buildings are in one way or another funded with federal money and there can be no religion in there. The university authorities admitted that this was not a happy situation, but it was the price to be paid for the substantial amount of federal funds that had been poured into university buildings.

W.E. McManus, *Felix Culpa - Report from the Ad Hoc Committee on School Aid*, 20 Cath. Law. 347, 353-54 (Autumn 1974).

This trend towards secularization and the marginalization of religion at historically religious colleges is not limited to

Catholic institutions. This troubling phenomenon exists across the denominational spectrum, and is the subject of a book by James Tunstead Burtchaell entitled *The Dying of the Light: The Disengagement of Colleges and Universities from their Christian Churches*, (Eerdmans 1998). Burtchaell documents the fading of religious mission and spiritual direction at colleges historically run by a number of denominations, including Congregationalists, Presbyterians, Methodists, Baptists, Lutherans and Evangelicals. Among the factors involved in this devolution of faith, Burtchaell fingers the growing role played by the state in college affairs. "The regional accrediting associations, the alumni, and the *government* replaced the church as the primary authority to whom the college would give an accounting of its stewardship." *Id.* at 837 (emphasis added). Petitioner's so-called "equality" argument would only augment the widening spiral of secularism at religious colleges.

Amici are deeply alarmed by these troubling glimpses of the bold new world of "equality" advocated by petitioner. For the sake of the religious schools and colleges that they cherish, and for the sons and daughters, and grandsons and granddaughters that they hope will yet benefit from the educational and spiritual guidance of these schools, amici ask that this Court reject petitioner's request to discard the pervasively sectarian category.

CONCLUSION

Because of the inadequacy of the factual record and the importance of the pervasively sectarian category to our constitutional framework, the petition for the writ of certiorari should be denied.

Dated: May 10, 1999

Respectfully Submitted,

NICHOLAS P. MILLER
Council on Religious Freedom
110 N. Washington Street
Suite 404
Rockville, MD 20850
(301) 294-8766

LEE BOOTHBY
Counsel of Record
Boothby & Yingst
4545 42nd Street, NW
Suite 201
Washington DC 20016
(202) 363-1773

Counsel for Amici Curiae

APPENDIX A

The Council on Religious Freedom ("CRF") is a national nonprofit organization that was formed to uphold and promote the principles of religious liberty and the separation of church and state. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis. Also, several members of the CRF Board have served on the governing boards of religious educational institutions and appreciate the need for those institutions to be free to convey their sponsoring church's religious ideals. Many of the supporters of CRF have children enrolled in church-operated schools, both at the secondary and collegiate levels, and they are concerned that these schools continue as sectarian ministries of their church.

The **Northwest Religious Liberty Association ("NRLA")**, serves as the advocacy agency of the North Pacific Union Conference of Seventh-day Adventists. It represents the Seventh-day Adventist Church and its constituent members and organizations with the purpose of protecting and advancing the principles of religious freedom in the Northwest region of the United States. Specifically, the states of Alaska, Idaho, Montana, Oregon, and Washington.

Within this region there is one Adventist college, Walla Walla Adventist College, as well as 140 Adventist elementary and secondary schools. NRLA is responsible for looking after the religious freedom interests of these institutions, and those of the church and its members generally. Because this case involves the issue of whether Columbia Union College, an Adventist college, is "pervasively sectarian," any decision is likely to have a direct impact on the legal rights and responsibilities of other Adventist colleges and universities, whose policies and practices are similar to those of the petitioner.

The Seventh-day Adventist Church State Council serves as the religious liberty educational and advocacy arm of the Seventh-day

Adventist Church for a five state western region of the United States, including Arizona, California, Hawaii, Nevada and Utah. In this region there are two Adventist universities, Loma Linda University and La Sierra University, and one college, Pacific Union College. The Seventh-day Adventist Church State Council defends the religious freedom interests of these institutions and those of the church and its members generally.

This case involves the issue of whether an Adventist college is pervasively sectarian, and thus any decision is likely to have direct impact on the legal rights and responsibilities of other Adventist colleges and universities. Because the Seventh-day Adventist Church State Council is charged with interpreting and applying Adventist teachings and principles regarding religious freedom, amicus desires to be heard in this case.

The Interfaith Religious Liberty Foundation is a Sacramento, California based non-profit educational organization that promotes religious liberty and the separation of church and state through the funding and development of curriculum materials.

Walter Pontynen is a retired Seventh-day Adventist history teacher and administrator and currently serves as president of the Interfaith Religious Liberty Foundation. As a former professional, sectarian educator, he has an interest in preserving the freedom of religious schools to pursue their sectarian mission. As a parent and grandparent of children attending sectarian educational institutions, he has a personal interest in maintaining the ability of Seventh-day Adventist schools to preserve the purity of their religious mission.